No. 14,541

United States
Court of Appeals
For the Ninth Circuit

GLEN W. PERSONS,
Appellant,

vs.

GERLINGER CARRIER COMPANY, a Corporation,
Appellee.

Appeal from the United States District Court
for the District of Oregon

Appellant's Brief

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FILED
MAR 24 1955
PAUL P. O'BRIEN, CLERK

HOUGHTON-CARSON COMPANY, PRINTERS

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INTRODUCTION

Plaintiff* brought this action against defendant based upon diversity jurisdiction for damages for personal injuries incurred when a machine manufactured by defendant tipped over while he was driving it. The jury returned a verdict in favor of the defendant.

*Plaintiff-appellant is referred to throughout as "plaintiff" and defendant-appellee as "defendant".

Plaintiff specifies as error certain evidentiary rulings which admitted testimony of defendant's witnesses, instructions of the Court below to which he failed to object in any manner, and the sustaining of objections to certain interrogatories.

Basic to an understanding of the entire case is a clear conception of the nature of the piece of machinery involved. Reference to defendant's exhibits will assist in such an understanding. The functions of the piece of machinery, known as a "fork lift truck" were well stated by plaintiff himself (Vol. II, Trans. p. 4) as "to lift logs for the mill; used it in the lumber yard to load lumber onto trucks and to unload lumber from trucks; to load lumber and unload lumber from trucks, or we used it to put logs into the mill." Other witnesses testified that their lifting capacity is 16,000 pounds, and that they lift those loads 16 or 18 feet. (Vol. II, Trans. pp. 162, 163, 199.) Needless to state, the machine could not perform such tasks without some sort of counterweight in the rear, as counsel for plaintiff conceded. (Vol. II, Trans. p. 174.) It is "simply a matter of balance". (Vol. II, Trans. p. 197.)

The machines were always shipped with the boom off. (Vol. II, Trans. pp. 52-53.) This is not, of course, the condition in which they are customarily operated in order to perform the tasks for which they are designed, a fact which was apparent to the

plaintiff who was thoroughly familiar with machinery in general and fork lift trucks in particular. (Vol. II, Trans. pp. 3-4.) It was while backing the machine down a slope in this condition during the process of unloading it that plaintiff was injured. (Vol. II, Trans. p. 14.)

Plaintiff charged the defendant with negligence in substantially two respects: that it failed to warn him of the fact that the machine was unstable and extra-hazardous in the condition in which it was shipped, which it knew or should have known; and putting on the market a machine which it knew or should have known was inherently dangerous when operated under these conditions. (Br. p. 3.)* Defendant denied that it was guilty of negligence in either respect and asserted that plaintiff was himself negligent in operating the fork lift truck at excessive speed, in suddenly applying the brakes, in failing to keep a lookout, and in suddenly turning the steering mechanism. (Vol. I, Trans. p. 32.) The jury, by its verdict, resolved these issues in favor of defendant.

Defendant, in this Brief, has answered only those Specifications of Error which plaintiff has argued; other specifications appearing to have been abandoned by plaintiff.

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*Appellant's Opening Brief is abbreviated "Br.", throughout.

SUMMARY OF ARGUMENT

Appellant's Point I.

The objections to plaintiff's interrogatories were properly sustained.

1. Long, detailed interrogatories on the eve of trial were burdensome and unreasonable.

2. The information was more conveniently available by plaintiff's Motion for Production of Documents.

3. The matter was within the discretion of the trial court.

In order to place this argument in context, defendant desires to bring to the attention of this Court the ruling here under attack. Defendant feels that an understanding of the circumstances preceding will materially assist the Court in appreciating the reasons underlying the trial judge's decision.

This case was filed in August, 1953, and interrogatories were filed by plaintiff on December 8, 1953 (Tr. 44). The case was first set for pre-trial on April 5, 1954, and for trial on April 6, 1954, but pre-trial was then reset for May 10, 1954 (Tr. 44). Pre-trial conference was held on May 10, 1954, and at that time the case was set for trial on June 15, 1954, and witnesses were subpoenaed for that date (Tr. 44). Neither party had requested a jury. On the date set for trial, counsel for plaintiff requested

that the case be heard before a jury, though no previous request or demand had been made. The Court granted the request and set the case for trial four weeks later. It was thereafter, and after the date when the case would have been tried had it not been for plaintiff's last minute request for jury trial, that these interrogatories were first filed. (Vol. I, Tr. p. 44.)

With reference to the question of lateness of the objections, the two days which they were overdue could hardly have occasioned prejudice to the plaintiff, particularly in view of the trial court's ultimate ruling that the objections were well taken. (Vol. I, Trans. p. 25.) The ruling itself must be considered in the light of the nature of the information sought to be elicited, and the fact that the objections were heard only a week before the date set for trial. In addition, it must be considered in the light of plaintiff's Motion for Production of Documents (Vol. I, Trans. p. 21) to which no objection was made and which called for the records of defendant from which the information requested by the interrogatories would have had to be compiled.

Plaintiff (Br. p. 20) refers to the trial court's attitude as "reflected by his ruling on the interrogatories and the motion to produce documents for inspection". As the Record shows, however, defendant made no objection to the Motion to Pro-

duce Documents and the trial court made no ruling thereon. The documents, to the extent that such were in existence and in defendant's possession, were, in fact, available for inspection at the time and place indicated in plaintiff's motion and also at trial. That plaintiff, for reasons best known to himself and his counsel, did not follow up this motion and take advantage of the production of the documents, is the fault of neither the trial court nor the defendant.

The discretion of the trial court in controlling both the manner and extent of discovery is very broad. *Newell v. Phillips Petroleum Co.*, 144 F. (2d) 338 (CCA 10, 1944); *Onofrio v. American Beauty Macaroni Co.*, 11 F.R.D. 181 (W.D. Mo., 1951); *Porter v. Montaldo's*, 71 F. Supp. 372 (S.D. Ohio, 1946). As stated in the latter case:

> "* * * interrogatories which require research on the part of the responding party are objectionable (Citing cases.) In the instant case, the defendant is required to conduct a most detailed research through its own records. This is no demand for simple and easily produced facts, but for a mass of information to be accumulated by the defendant for the benefit of the plaintiff." (71 F. Supp. at pp. 374-375.)

If the court felt, at the eve of trial, that production of the relevant documents was the appropriate manner of proceeding, rather than by interroga-

tories, long, detailed, and complex in their nature, the decision was his to make and should not be disturbed except for a manifest abuse of his judicial discretion. No such abuse has been here demonstrated. The trial court properly sustained defendant's objections.

Appellant's Point II.

Testimony that defendant's officers never heard of any prior accidents was admissible for the purpose of proving lack of notice to defendant of any dangerous propensities of the machine, particularly since plaintiff was contending that defendant knew of the dangers which plaintiff claimed existed.

Plaintiff in this point attacks as erroneous the admission of evidence by the trial court that defendant's general manager and executive vice-president and its assistant general manager had never heard of any incident involving the tipping over of Gerlinger lift trucks. The basis of this objection appears to be that the evidence is hearsay. This objection might be well taken were the evidence introduced for the purpose of proving that Gerlinger lift trucks could not or would not tip over. That was not the reason, however, for the introduction of this evidence.

There never was any issue in the case as to the tipping of the particular lift truck here involved.

The Agreed Statement of Facts in the Pre-trial order sets forth, in fact, that "while the Gerlinger fork lift truck was being operated by the plaintiff, plaintiff suffered injury to his person." (Vol. I, Trans. p. 27.) Two of the contentions of plaintiff, however, were that defendant "knew or should have known" that the fork lift truck was unstable and that it was likely to be operated by individuals such as plaintiff under the conditions and circumstances of this accident and that it was negligent in not apprehending and warning plaintiff of the danger. (Vol. I, Trans. pp. 29-30; Br. p. 3.) Clearly, the question of whether or not defendant had any notice of similar accidents, either by hearsay or otherwise, was relevant to this issue. Equally clearly, defendant could not prove that it did not have any notice of similar accidents other than by putting its officials on the stand and having them testify to the fact that they had never received any such notice.

Plaintiff, in fact, attempted to elicit similar information from defendant's officers, including Williams, whom he called as his own witnesses. For instance, Williams was asked (Vol. II, Trans. p. 48):

> "Q. I assume that you did not give any warning of the type I have been asking about because, in your opinion, there was no danger in operating it with the boom detached, is that right?

A. That is correct."

Gordon Akers, defendant's assembly foreman, called by plaintiff, was asked on direct examination (Vol. II, Trans. p. 65):

> "Q. I take it that, having been employed there for 18 years, if you had thought there was any danger you would have given a warning?
>
> A. That is true.
>
> Q. If you thought that there had been a change in design which had so affected its stability as to make it liable to turn over under those conditions, you would have given warnings?
>
> A. Yes."

Such a line of examination discloses that plaintiff considered relevant the question of the state of mind of defendant's employees and officials. In the light of the allegation in his complaint that the defendant "knowing or having notice of said danger" (Vol. I, Trans. p. 4) acted negligently, he could hardly contend otherwise. Defendant's questions to Williams and Gohrke, now attacked as hearsay, were for the purpose of eliciting from them the testimony that they had no notice of any accidents involving Gerlinger lift trucks which might put them upon inquiry or notify them of any dangerous propensities of this machine.

The cases cited by plaintiff, when viewed in the light of the issues framed by the pleadings and the pre-trial order, become totally inapplicable. *First National Bank v. Stewart,* 114 U.S. 224, 5 S.Ct. 45, 29 L.Ed. 101 (1885), involved no question of notice. The quoted question was asked for the purpose of proving that no money had been paid, and since it was not shown that the witness would necessarily have known if it had been, the question of whether he had any information from any source was clearly improper. If, on the other hand, the issue in the case had been whether the bank had any notice that money had been paid, an entirely different situation, analogous to the present one, would have been presented. The fact that there may, as plaintiff states (Br. p. 22), have been many accidents involving Gerlinger lift trucks of which Williams had no knowledge, is not in any way relevant to the question of whether he did have knowledge of accidents which did happen — and the latter, not the former, was the issue in the case.

(It should, incidentally, be noted that plaintiff, in quoting from the *Stewart* case (Br. p. 22), has inadvertently omitted the word "but" from the twelfth line of the quotation, which substantially changes the sense of the quoted sentence. It should read, "It did not appear *but* that many payments of the money have been made to the Bank without knowledge of the witness.")

Plaintiff also cites *Murphy v. Lake County*, 106 C.A. (2d) 61, 234 P. (2d) 712, and *Giddings v. Superior Oil Co.*, 106 C.A. (2d) 607, 235 P. (2d) 843. In the *Murphy* case, the issue was whether or not the County had notice of defects in a road. The Court properly excluded testimony of a witness, not a county official, that he had driven over the road several months previously without accident. There was no showing that any County official knew of this occurrence, and there was substantial evidence from other sources that the County had notice of the defective condition. Consequently, the offered testimony was of no relevance to the question of notice.

The *Giddings* case more nearly approaches the present situation. Plaintiff attempted to show that an action had been filed against respondent in another county for an injury to a child, in order to prove that defendant had notice that its oil well pumps were attractive to children. The Court affirmed the exclusion of the evidence, on the ground that it had not been shown that the circumstances were similar. The situation is precisely the reverse of the present situation, and the case would be relevant to the question of whether plaintiff might here have proved that other Gerlinger fork lifts had turned over. But that is not the situation. Defendant here was desirous of proving that it had not been put on notice that any danger existed,

and therefore showed that its officers had never heard of a lift truck tipping over except in isolated instances under entirely different circumstances. Had there been a substantial number of such instances, or had the circumstances been anything but highly unusual, plaintiff might then have properly contended that defendant did have notice of a dangerous situation requiring some action on its part. In order to disprove such a contention, defendant properly inquired of the witnesses whether they had ever heard of any such instances and then brought out the nature of the few which had occurred. (Tr. II, pp. 53, 186-187.)

All three of the cases discussed above, incidentally, were cases in which the ruling of the trial judge were affirmed. The importance of this is related to the wide latitude in this area given to the trial court, as indicated by the case of *Blackwell v. J. J. Newberry Co.,* 156 S.W. (2d) 14 (Mo. App. 1941), cited at p. 26, Appellant's brief, which discusses at length the opinions of Professor Wigmore on this subject. His conclusion is unrelated to the question of notice, and refers solely to whether the quoted type of evidence is admissible for the purpose of showing defects in the machine, but he nevertheless concludes:

> "The true solution of the conflicting considerations, then, is that evidence of the sort, when relevant, should be admitted, unless *in the dis-*

> *cretion of the trial Court* it seems to involve a serious inconvenience by way of unfair surprise or confusion of issues." II Wigmore (3rd Ed.), p. 430, §444. (Emphasis supplied)

The italicized portion of the foregoing quotation is perhaps explanatory of the fact that plaintiff can cite only affirmed cases for his proposition that the present one should be reversed.

Plaintiff attempts to establish that California law governs the reception of the evidence here involved. (Br. pp. 24-25.) In so doing, he overlooks Rule 43(a) of the Federal Rules of Civil Procedure, which provides that in the case of conflict, all evidence shall be admissible which is admissible under either the old equity rules, the statutes of the United States, or the rules of evidence of the state in which the United States court is *held*. This would indicate that controlling authority in Oregon would be decisive of the question, if it held the evidence to be admissible. Such authority exists.

The case of *Robertson v. Coca Cola Bottling Co.*, 195 Or. 668, 247 P. (2d) 217 (1952), was an action against a bottling company for injuries sustained when a bottle exploded. In the words of the Court (at 195 Or. 681):

> "It is contended that the court erred in permitting agents of the defendant to testify that they had never before heard of a bottle of Coca Cola exploding, and that there had never

before been a claim filed against the company. There is a conflict of authority upon this question. 38 Am. Jur., Negligence, §315, p. 1014; 128 ALR 606, Note. However, this court has at least once indicated its adherence to the rule of admissibility. In *Briggs v. John Yeon Co.*, 168 Or. 239, 122 P. (2d) 444, we said:

" '* * * That other persons had used the floor without mishap is evidence in conflict with the truth of plaintiff's claim and would warrant an inference that the floor was in a reasonably safe condition, but it would be for a jury to say whether it overcame the force of the sworn testimony on behalf of the plaintiff and the reasonable inferences therefrom. * * *'

"*Where, as in this case, it is alleged that the defendant knew, or in the exercise of reasonable care should have known of the danger, we think such evidence is admissible.*" (Emphasis supplied)

The evidence was properly admitted.

Appellant's Point III.

Testimony that defendant's officers had never heard of any prior accidents was admissible for the purpose of proving complete lack of notice, without any showing that the accidents of which they had not heard occurred under comparable circumstances.

Under this point, plaintiff attacks the same testimony as under the previous point, upon the

ground that the appliance in question was not shown to have been given the same use as that here involved, or that the appliance itself was different. Again plaintiff misconceives the nature of the issue when he says,

> "That testimony is harmful under the circumstances of this trial because it inferred to the jury that the Gerlinger fork lift truck would not turn over unless operated under the circumstances of other accidents . . ." (Br. p. 26).

The evidence was not offered to prove that the fork lift truck would not turn over, but that defendant had no notice that it might.

In the two cases cited, both of which affirmed rulings of the trial judge, *Denver City Tramway Co. v. Hills,* 50 Colo. 326, 116 Pac. 125, and *Blackwell v. J. J. Newberry Co.,* supra, the claim agent and store manager, respectively, were denied the opportunity to testify that they had no notice of similar accidents. The *Denver City* case involved a plaintiff who had become entangled in a trolley rope that was left coiled at his feet, and the *Blackwell* case involved a plaintiff who had fallen over a small stepladder in the aisle. Their irrelevance to a case such as the present, wherein plaintiff charges the defendant with having designed and put on the market a machine which was inherently unstable is apparent. As the court said in the *Den-*

ver City case:

> "This may have been the only time in many years that the appellant through its agents was negligent with respect to its trolley ropes . . ."

It further stated:

> "The cases cited to sustain this (opposite) position relate to *structural* position where an appliance is in a permanent fixed position on all cars of a carrier." (Emphasis added)

In the *Blackwell* case, likewise, the Court pointed out that there was no showing that the ladder remained always in one position and was never moved. The two cases would be more nearly relevant were plaintiff charging defendant with having negligently failed to construct this machine in accordance with its usual design. Lack of notice of other accidents would then be irrelevant, in the absence of a showing that they were similarly constructed. But plaintiff has made no such claim. Its claim is that the fork lift was basically unstable by reason of its design (Br. p. 3).

As previously mentioned, the *Blackwell* case relies heavily on the conclusions of Professor Wigmore, who would leave the matter in the hands of the trial judge even in those cases where the issue of notice does not exist.

Defendant feels that this situation is also controlled by the Oregon case of *Robertson v. Coca*

Cola Bottling Co., supra. Taken at its face value, the proposition stated by plaintiff as its heading for this point would require that before defendant could show that it had never heard of any similar accidents involving this or other models of Gerlinger lift trucks, it must first show that the other accidents, of which it had never heard, and which may never have happened, occurred under substantially similar circumstances. The absurdity of this proposition is self-evident. If the evidence may come in, as the *Robertson* case holds, it must come in without such a foundation because such a foundation cannot be laid. The rule of law cited by plaintiff relates to a situation where the evidence is introduced, not for the purpose of showing lack of notice, but for the purpose of showing that the accident could not have happened without some additional cause such as the negligence of plaintiff. In the present case, it was clearly admissible.

Appellant's Point IV.

A. Rule 51 of Federal Rules of Civil Procedure renders this entire point improper, because plaintiff has no standing under any theory to raise errors in the court's charge to which he did not take any exception.

B. The court's instructions were a correct statement of the law and were not erroneous.

C. This is not a situation in which the Court of Appeals should consider errors in the instructions, if any, on its own motion.

At the conclusion of the court's instructions to the jury the following proceedings took place:

> "THE COURT: Under the Rules of Civil Procedure, you are now entitled to state objections to the instructions.
>
> MR. DILLEY: The plaintiff has no objection to the instructions.
>
> THE COURT: For the defendant?
>
> MR. COSGRAVE: The defendant objects to the Court's failure to give defendant's Requested Instructions 10, 11 and 12.
>
> THE COURT: The objections will be noted on the record, Court is now in recess."

Plaintiff's counsel having listened to the court's instructions and having found them as favorable as plaintiff could possibly hope, apparently did not wish them disturbed. It was only when the issues were determined against him that plaintiff decided he would like the instructions changed.

Under this heading, appellant attempts to suggest to this Court what it should consider on its own motion, because appellant is himself precluded from assigning it as error by Rule 51 of the Federal Rules of Civil Procedure. This procedure

should not be countenanced, in that it invites argument by brief of questions which the Rules specifically state cannot be so argued. If this Court wishes to consider an error on the face of the record, that may be its privilege. But appellant should not be allowed to raise, and then argue at length a question which he is not entitled to raise, under the guise of suggesting to the Court what it should consider "upon its own motion". Nevertheless, almost half of the Argument of Appellant's Opening Brief is devoted to this point, and under the circumstances, some rebuttal is in order.

Three cases are cited by plaintiff for the proposition that the Court may consider error on its own motion. The extraordinary nature of all three is the clearest indication of the inappropriateness of such a procedure to the present case. In *Hormel v. Helvering,* 312 U.S. 552, 61 S. Ct. 719, 86 L. Ed. 1037 (1941), the Supreme Court was, in the first place, not considering the Federal Rules of Civil Procedure, but the statutes which gave the Circuit Courts of Appeal power to "modify, reverse or remand" decisions of the Board of Tax Appeals. In that case, the rather far-reaching decision of *Helvering v. Clifford* had come down from the Supreme Court after the B.T.A. decision, and the Supreme Court felt that the *Hormel* case should be returned to the Board for revaluation of the facts in the light thereof. The question there was first raised in the Circuit

Court of Appeals, because it was not suspected until the *Clifford* case was decided.

In both *Shimabukuro v. Nagayama,* 140 F. (2d) 13 (1944), and *Dowell, Inc. v. Jowers,* 166 F. (2d) 214 (1948), the Court indicated that the decision below was so far out of line with the evidence, that had the case come up on an appeal from a verdict directed for the losing party, they would have been required to affirm. One judge in the former, and the Court, in the latter, as a matter of fact, found that a directed verdict for the appellant should have been granted, but the Court in the *Dowell* case nevertheless decided to reverse for a new trial. Furthermore, in the *Dowell* case, the court, which discussed the issue only "because the case is to be retried . . ." (p. 216), said:

> "We think it clear beyond argument that jury was influenced in its mathematical computations by the statement."

The statement referred to is quoted at page 27 of Appellant's Opening Brief. The trial court in effect told the jury that in similar cases of death, the verdict had been "some $10,000 or $15,000" and went on to advise them that the present case involved four persons, a wife and three children. The jury brought in a verdict for $62,000.

The two other cases cited (Br. p. 28) are totally irrelevant. They were, in effect, mere repetitions of rulings on evidence.

The court's instructions in this case were, in fact, a model of plain, clear, and correct instructions to a jury, and plaintiff has not been able to point out, even now, a single error in those instructions.

Plaintiff begins by saying that the trial court "destroyed" vital proof of his case. The beginning of this "destruction" occurred when the trial court ruled that defendant could show a motion picture film of the fork lift truck involved in this case which had not been examined by plaintiff's expert. In the course of his ruling, which was made in the absence of the jury, the experienced trial judge advised counsel that in his opinion, "Engineers are not going to decide this case." (Tr. I, pp. 159, 160.)

The court's opinion and his subsequent instruction to the effect that the jury was not trying the engineering features of the machine as a general proposition was a correct statement of the law. *Ford Motor Co. v. Wolber,* 32 F. (2d) 18 (C.C.A. 7, 1929); *Dillingham v. Chevrolet Motor Co.,* 17 F. Supp. 615 (W.D. Okla., 1936).

To this appellant attributes the "fact" that the jury must have ignored the testimony of Mr. James, whose qualifications "was never challenged". Defendant respectfully suggests that even if the jury

fully credited Mr. James, it still could have found the conditions he referred to sufficiently obvious and sufficiently inherent in the nature of the machine as not to require a warning, or have found plaintiff guilty of contributory negligence. Defendant believes, however, that an examination of the testimony of Mr. James reveals wherein lay the seeds of its "destruction" and its being ignored by the jury. Even a jury of laymen might begin to suspect the competency of a so-called "expert" who, in computing the point at which a machine would tip over, did not find it essential to pay much attention to the height of the center of gravity (Vol. II, Trans. p. 136), or who thought that it was possible to have a fork lift truck which could operate with a rigid rear axle. (Vol. II, Trans. pp. 152-155.)

Plaintiff also claims that it was error to instruct on the question of contributory negligence at all, yet in his brief, at pages 34 and 35, catalogs some of the evidence sufficient to take the case to the jury on this point. As an example, item (e), a statement of an eyewitness of the accident containing the sentence quoted by plaintiff, which the witness admitted he thought was true when it was made some two and a half months after the accident (Vol. II, Tr. 87), but which, almost two years after the accident, he no longer thought was accurate. The jury, of course, might well have trusted his earlier recollection in preference to the later one.

Plaintiff overlooked, in summarizing the evidence of contributory negligence, the statement of plaintiff that he did not see the ground before he backed down and did not know what the road condition was. (Tr. II, pp. 35, 36.)

Plaintiff was represented at trial by counsel who diligently sought to protect his rights, as the numerous objections raised in his Brief demonstrate. They listened to the trial court's charge and found nothing therein to object to. They should not be permitted to gamble on the result and evade the requirements of Rule 51 under the guise of pointing out to the Court what it should review on its own motion. The stringency of Rule 51 is well illustrated by the case of *Woodworkers Tool Works v. Byrne*, 191 F. (2d) 667 (C.C.A. 9, 1951), in which the trial court gave an erroneous charge on *res ipsa loquitur*. Appellant made a general objection to the charge on *res ipsa loquitur*. This Court held that the requirements of Rule 51 were not met because (191 F. (2d) at p. 676):

> "The appellant failed to state *distinctly* to the court below the matter in the charge to which it objected and the ground of its objection." (Emphasis in original)

Appellant's Point V.

The challenged testimony was properly received.

A. The witnesses were properly qualified to testify concerning the matters regarding which they were examined.

B. The qualifications of an expert witness are within the discretion of the trial court.

This point, in both its parts, seems to be based entirely upon two misconceptions. The first is that only a qualified practicing engineer was an "expert" for the purpose of testifying regarding safety factors in the balance of this machine, and the second that a man must have driven this precise model of machine in order to be able to testify about it. Neither is correct.

Witness Blacketer testified to extensive experience with fork lift trucks of various makes, including Gerlingers. (Vol. II, Tr. pp. 161-163.) Witness Herzog likewise testified to extensive experience with Gerlinger fork lift trucks. (Vol. II, Trans. pp. 170-171.) Witness Gohrke, defendant's assistant manager, likewise had dealt with lift trucks for many years. (Vol. II, Trans. p. 180.) The fact that these witnesses were not engineers did not in any way affect their ability to express an opinion about the stability of these machines. They had used them, run them over various types of terrain, and ac-

quired an extensive practical experience with them. The trial judge apparently felt that they were qualified by reason of that experience to testify regarding the likelihood of the machine tipping over under various conditions. As the Court stated in *Paradise Prairie Land Co. v. U.S.*, 212 F. (2d) 170, 173 (C.A. 5, 1954):

> "The trial judge is vested with a broad judicial discretion in admitting or rejecting expert testimony, but lack of a statutory license to practice surveying is not of itself sufficient to justify the rejection of the testimony of one who is otherwise qualified as an expert.
>
> "An expert is one who qualifies as such by reason of special knowledge and experience, whether or not he is authorized to practice in his special field under a licensing requirement imposed by statute. The inquiry by the trial judge as to the qualifications of such a witness should be whether or not the witness possesses the special knowledge and experience to qualify him as an expert, not whether or not he has complied with the state's licensing requirements to practice that profession."

The *Paradise Prairie* case is one of the rare instances in which an Appellate Court found error in a ruling on the qualifications of an expert, and is, perhaps, explained by the fact that the court had already concluded to reverse and remand the case as well as by the fact that the ruling *excluded* evi-

dence. The general rule, as stated in *Diesbourg v. Hazel-Atlas Glass Co.,* 176 F. (2d) 410 (C.A. 3, 1949), is that "The matter of who may qualify as an expert is pretty much within the discretion of a Trial Judge," as against a claim that "plaintiff's expert was no expert at all". In *Chicago Great Western Ry. Co. v. Beecher,* 150 F. (2d) 394 (C.C.A. 8, 1945), the Court correctly summed up the rule as follows (p. 400):

> "In the federal courts the qualifications of an expert witness before he will be permitted to express an opinion are a matter within the reasonable discretion of the trial court and its ruling thereon will not be reversed unless that discretion was abused. (Citing cases)"

The Oregon rule is in accord. In *Stonebrink v. Highland Motors, Inc.,* 171 Or. 415, 137 P. (2d) 986 (1943), the court stated, in reference to the propriety of permitting a machine shop operator to testify that an automobile jack was made of cheap metal, and poorly constructed:

> "Whether a witness is qualified to testify as an expert is a matter resting within the sound legal discretion of the trial court and its ruling in reference thereto will not be disturbed on appeal unless there is an abuse of discretion. (Citing cases.)" (171 Or. at pp. 425-426.)

CONCLUSION

Plaintiff had a fair trial on all the issues. His case was submitted to the jury upon instructions which he at that time found unexceptionable. The jury resolved the issues against him. Nevertheless, he would now have this Court reverse and remand the case for a new trial "upon the issue of damages alone, or in the alternative, for a new trial upon all issues." (Br. p. 41.)

Plaintiff's case at best amounted to nothing more than a statement of opinion by his "expert" witness that the design of defendant's lift trucks was unsafe, and there is substantial authority that a mere difference in judgment among engineers about the appropriate method for designing a piece of machinery is not sufficient evidence of negligence to take a case to the jury. See, e. g. *Ford Motor Co. v. Wolber,* 32 F. (2d) 18 (C.C.A. 7, 1929); *Dillingham v. Chevrolet Motor Co.,* 17 F. Supp. 615 (W.D. Okla., 1936).

The evidentiary rulings assigned as error all admitted rather than excluded evidence. The jury had all the facts before it, and properly so under the liberal policy established by Rule 43(a) of the Federal Rules of Civil Procedure and the controlling decisions. The objections to instructions are not properly before the Court because not made below. The sustaining of the objections to the interroga-

tories was well within the discretion of the trial court, whose ruling thereon was correct. The judgment of the United States District Court for the District of Oregon should be affirmed.

Respectfully submitted,

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